Ref. No. 386

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

October 17, 1991

JORGE M. IPINA, Complainant	)	
	)	8 U.S.C. 1324b Proceeding
v.	)	
	)	Case No. 90200349
MICHIGAN DEPARTMENT OF LABOR, Respondent	)	

DECISION AND ORDER

Appearances: Jorge M. Ipina, pro se;
Samuel A. Black, Director, Michigan Department of Labor, Detroit, Michigan, for respondent.

Before: Administrative Law Judge McGuire

Background

This proceeding addresses the complaint of Jorge M. Ipina (complainant) against his employer, Michigan Department of Labor (respondent), in which he alleges that on or about October 1, 1989, respondent refused to hire complainant based upon his citizenship status and Hispanic national origin, in violation of the pertinent provisions of the Immigration Control and Reform Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986).

On May 10, 1990, complainant filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices of the Department of Justice (OSC), in which complainant alleged that respondent had engaged in an unfair immigration-related employment practice. Particularly, complainant initially charged that the Michigan Employment Security Commission (MESC) had failed to hire him for the position of treasurer because of his citizenship status.

On September 7, 1990, following its investigation of complainant's allegations, OSC notified complainant that it would not file a complaint on his behalf before an administrative law judge because there was no reasonable cause to conclude that the

provisions of IRCA had been violated. In that correspondence, also, complainant was notified of his right under IRCA to file a complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO), as well as the need to have done so within 90 days of the end of OSC's 120-day investigative period, or by December 6, 1990.

On November 23, 1990, complainant timely filed a Complaint with OCAHO, realleging that respondent had violated the provisions of IRCA in the course of discriminating against him because he is a naturalized citizen of the United States, as opposed to having acquired such citizenship status by birth.

On January 22, 1991, OCAHO assigned this matter to the undersigned for further handling.

On February 4, 1991, complainant filed a Motion to Amend, in which he requested that his Complaint be amended to include an allegation that respondent had discriminated against complainant on the basis of his Hispanic national origin as well as the previously-pleaded ground of citizenship status. That motion was granted on February 19, 1991.

On July 17, 1991, following written notice to the parties, the matter was heard before the undersigned in Allen Park, Michigan.

Summary of Evidence

Complainant's evidence consisted of his testimony and the introduction of six documents which were marked and entered into evidence as Complainant's Exhibits 1 through 6.

Respondent's evidence was comprised of the testimony of James Norman (Norman), respondent's Deputy Director for Administration, and the placement into evidence of five documents marked and entered as Respondent's Exhibits A through E.

Complainant testified that he is 51 years of age, having been born on January 27, 1940, in Sucre, Bolivia. He came to the United States as a student English teacher in 1959 or 1960, returned in 1962 on a student visa at age 22, and has lived here since, having become a naturalized citizen in November, 1974.

His resume (Complainant's Exh. 4), as well as his testimony, discloses that over a 16-year period extending from 1962 to 1978, claimant earned one Baccalaureate and three Masters Degrees. His Bachelor of Arts Degree, with a double major in history and business administration, was awarded in 1966. In 1968, he earned

a Master of Arts Degree in economics, with a minor in statistics. In 1970, he began a four-year curriculum which resulted in his being awarded a Master of Business Administration Degree in 1974, with a major in finance and a minor in accounting.

For the following year, ending in 1975, complainant advises that he took graduate courses in management, business and labor law, marketing management and international marketing. In 1978, following a two-year curriculum, which presumably began after he began working for respondent in May 1976, he was awarded a Master of Public Administration Degree, with a major in political science and a minor in public sector fiscal policy and budgeting.

In June, 1968, complainant began his adult work career as a market research analyst for the Hush Puppies Shoe Division of Wolverine World Wide, at that footwear manufacturer's corporate headquarters in Rockford, Michigan. He performed those job duties until August 1972, when he became Wolverine's marketing systems manager, a position he held until October 1974. From November 1974 until May 1976, he served as that firm's marketing research manager, at an annual salary of $20,000.

Complainant testified that he voluntarily terminated his employment relationship with Wolverine in May 1976 after the officials there advised him "that I was too much of an academic person, that I had administrative experience but I never had sold a pair of shoes, and Hush Puppies wanted to promote in the marketing area..." (T. 39) and that "because they needed somebody with some kind of numbers background..." (T. 40).

During that same month, May 1976, because he felt that "I wasn't getting any place in Wolverine World Wide" (T. 47), because he wanted to work for the government (T. 40), and because "I'm politically kind of inclined." (T. 48), he accepted employment at a lower salary, $16,000 or $17,000 yearly, as an economic affairs specialist in the respondent agency in the State capital in Lansing, Michigan. He performed those duties until October 1977, when he began managing a research and data standardization unit. After 15 months in that position, he became the chief of a grants, contracts and support section for some 10 months, or until September 1979, when he assumed his present duties of contract officer in respondent agency's Bureau of Community Services, which is located in Lansing, also. His current annual salary is $38,795.

In August, 1989, MESC, a component of the respondent agency, began seeking applicants for two positions, treasurer and assistant treasurer, both of which paid $66,378 yearly.

Complainant stated that those two positions involved 12-month temporary appointments and then became permanent, with the incumbent's contract being renewed yearly thereafter, based upon performance (T. 34,35).

Complainant also testified that he received a letter from MESC dated August 24, 1989, inquiring as to whether he was interested in the position of treasurer. He stated that he had been sent that letter because in filling any position involving an employment term in excess of 30 days, as in the case of the treasurer position, the Michigan Civil Service Commission (MCSC) rules require that all persons whose names appear on any list of eligibles must be notified and inquiries made concerning their interest in such position (T. 106). That letter had been sent to him as well as to 13 other persons whose names comprised a 14-person register, or list of eligibles, all of whom had been determined to have been qualified for that position (T. 36, 37).

Complainant also stated that he was interested in the treasurer position for two reasons. That job was to be performed in Detroit, which is much closer to his home in Pontiac than is his present job location in Lansing and the commuting distance to Detroit would have resulted in his having driven some 100 fewer miles each workday. In addition, the treasurer position would have meant a promotion in salary from $38,795 to $66,378 yearly (T. 32-34, 66).

He also testified that only two persons filed for the treasurer position, A. Edwin Dore (Dore), who was a state employee in Lansing, also, and himself. Both were separately interviewed in September 1989 by a three-person panel, one of whom was Norman. Complainant testified that his oral interview took 45 to 60 minutes, was very comprehensive and consisted of questions from all three persons on the panel (T. 61, 64-67).

Complainant heard nothing further from MESC following his interview, but in late October 1989 he received a telephone call at his office from a Michigan State Police detective lieutenant who wanted to interview him at complainant's office concerning an urgent matter. Complainant testified that he didn't wish to have the police officer come to his office, given appearances, so he arranged to go to the lieutenant's office at 1 p.m. on the next day, November 1, 1989.

At that meeting, the police officer inquired as to whether complainant had accepted the MESC treasurer position and he replied that that job had not been offered to him (T. 69). The police officer then went on to advise complainant that since he

had placed second in competition for that position, he was the prime suspect in an investigation concerning threatening telephone calls that had been made to the office and home telephone numbers of the person to whom the MESC treasurer position had been offered (T. 70). Complainant told the police officer that he would not likely be involved in making telephone threats, especially in view of complainant's accent (T. 71).

After leaving the police lieutenant's office following that 45-minute meeting, complainant went to the nearby office of Norman, a member of the three-person panel before which he had interviewed. He stated that Norman told him that Dore had finished first in the selection process, had been offered the treasurer position, had accepted and then had declined after receiving several threatening telephone calls (T. 73, 74). Complainant then told Norman that as the person who had finished second in the competition, he was still interested, only to learn from Norman that the interviewing panel had decided that complainant was not qualified for the position. Upon leaving Norman's office, complainant felt certain that he would not be offered the treasurer position.

Complainant also testified that following his meeting with Norman on November 1, 1989, he repeatedly and unsuccessfully attempted to reach Samuel A. Black (Black), MESC's personnel director, in order to discuss the treasurer position. He reached Black in January 1990 only to learn that Black was no longer serving as personnel director and that Norman was the person to contact. That because MESC "had been presumably taken over" (T. 97), administratively, by respondent in the course of a then recent reorganization. Since he had already spoken to Norman about the job on November 1, 1989, and had concluded that he would not be appointed, complainant "decided to file a civil service complaint or a grievance" (T. 97).

In April, 1990, complainant learned that the treasurer position at MESC had not been filled, but that one Ms. Engle, one of respondent's employees in Lansing, had been selected as MESC's assistant treasurer, a position opening of which he was unaware.

In January 1990 complainant filed a grievance against respondent, contesting his not having been selected for the treasurer opening, based upon respondent's having decided, according to Norman, that complainant did not have proper communications skills and did not have a good management background (T. 99).

Complainant also maintained in that grievance that after Dore had declined to serve as MESC treasurer, complainant, as the person who had finished second in that field of two candidates, should have automatically been appointed, instead, since he had been certified as having been highly qualified for that position. And that despite the findings and recommendations of respondent's three-person interviewing panel that complainant did not possess the required qualifications.

He also believes that respondent improperly expanded the field of eligible candidates for the treasurer position in the following manner. After Dore declined, respondent decided to again advertise the position in an expanded geographic area within the State of Michigan, in the hope of receiving a correspondingly larger number of applications from qualified candidates. Complainant testified that "I knew that was an excuse to hide discriminative treatment." (T. 102).

As of April 1990, complainant had filed a civil service grievance against MESC and respondent based upon violations of the Michigan civil service appointment rules, as well as claims of discrimination based upon his Hispanic national origin and his physical handicap, that of a biaural hearing loss.

During April 1990, as noted earlier, complainant learned that Ms. Engle had been appointed to the position of assistant treasurer at MESC, and that the position of treasurer had not been filled. Complainant testified that "I could see that there was actual discrimination." (T. 105).

Complainant also stated that in conducting his original legal research in order to determine whether MESC had violated any MCSC rules in connection with soliciting applications for, or filling the position of, treasurer he had expanded that research into the area of Federal law. That in order to determine whether there were any Federal legal remedies available to him, also.

On April 30, 1990, according to complainant's testimony, he
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lleging discriminatory employment
ed upon his Hispanic national
ue, that which was based upon
n under IRCA in connnection with
ccurring on or about October 1,
nowledged that he subsequently
e to include a charge of Hispanic
on as well. He stated that his Title
een ruled upon and is still pending.

Complainant testified that but for the fact that he is Hispanic he would have been hired as treasurer at MESC. He bases that opinion upon the fact that it is common knowledge that "MESC is favorable to certain minorities. Those minorities happen to be not Hispanic." (T. 119), and that Hispanics are not treated fairly, and less favorably than Afro-Americans (T. 121). He pointed out that the three most current work force reports published by MCSC reveal that no Hispanics serve in Level 15 or above positions at MESC, even though some three percent (3%) of MESC's 2,210-person work force are Hispanic.

He also bases his Hispanic national origin discrimination charge upon the fact that the person who was named assistant treasurer at MESC, and who for all intents and purposes, according to complainant, performed the duties of the unfilled treasurer position, also, was not qualified for that position (T. 132).

Norman testified that he has served as the respondent's Deputy Director for Administration since January 1991 and at the deputy level since March 1987. He acknowledged serving on the three-person panel which interviewed complainant and Dore for the treasurer position at MESC.

He stated that MESC had decided to create two temporary positions, those of treasurer and assistant treasurer, for a one-year period, ending on September 30, 1990, in order to determine whether by having done so certain organizational objectives could have been met. On August 24, 1989, MESC arranged for the mailing of announcements concerning those temporary positions.

Those letters were sent to each of 14 persons whose names had been placed on a list of eligibles which had been certified by MCSC for the positions comparable to MESC's treasurer position. Letters were also mailed on the same date to 16 persons whose names had been similarly certified as having been qualified to be considered for positions comparable to MESC's assistant treasurer temporary opening.

The persons receiving those
respective position and each was
interview for that position. Th
on both lists. In that event, t
and were invited to interview fo
Since complainant's name, and th
placed on the list of eligibles
that accounts for his not having
assistant treasurer opening.

Following interviews in September 1989, Dore was selected for and was offered the temporary treasurer position. He accepted the job offer initially, but then declined following the alleged receipt of threatening telephone calls at his office and at his home. The only other person who had been interviewed for that position was complainant, and he was not offered the job because he was found to have lacked the qualifications for the treasurer opening. As a result, the temporary position of treasurer was not filled, although the temporary position of assistant treasurer was, in the person of one Sandra L. Engle (Engle).

Respondent's evidence included the July 16, 1991 statement of Engle, who was then and presumably is currently serving as the Director of MESC's Office of Administrative Services in Lansing, Michigan, to the effect that she interviewed for the assistant treasurer position at MESC on September 9, 1989, that she was offered that position on or about September 25, 1989, that she accepted the position, that she assumed those duties on October 16, 1989, that the treasurer position at MESC had not been filled during her tenure, and that she had not served as MESC's "acting treasurer" during her tenure (Respondent's Exh. D at 2).

Norman also testified that in accepting applications for those two temporary positions in August 1989, MESC wanted to hire persons who possessed management or supervisory experience at an agency-wide level, and preferably in the public sector. MESC was also seeking applicants who had considerable experience in dealing with Federal officials at the policy level. Among other qualifications, MESC desired someone having an intimate knowledge of the State budget appropriations process, and candidates who also had broad experience in evaluating programs (T. 146).

Norman stated that he is aware of complainant's qualifications since he hired complainant at the respondent agency in 1979 and until 1987 he supervised the bureau in which complainant presently works. Over that eight-year period he became quite familiar with complainant's background and abilities.

Upon examining the 11-page resume of Dore (Respondent's Exh. B), Norman compared his qualifications with those of complainant. In August 1989, Dore was the Director of Planning, Administration and Evaluation for the Secretary of the State of Michigan, and had departmental level responsibility which involved supervising the finance and budget functions of that agency, those career skills which MESC was seeking in its temporary treasurer and assistant treasurer positions. Norman also pointed out that Dore had previously served as the Deputy Controller of Wayne County,

Michigan, one of the largest counties in the United States, as well as having previously served as Deputy Controller of Ingham County, Michigan (T. 147).

He further testified that in comparison, complainant was not familiar with the State budget and appropriations processes, nor was he ever involved in department-wide interaction, nor had he interfaced with the State legislature on an ongoing basis. And except for some nine months in his initial employment at respondent agency in 1979, complainant has not had any supervisory or management responsibilities. In addition, complainant has not been in contact with Federal officials at the policy level and has not been given any department-wide responsibilities in the area of program evaluations. In summary, Norman found that complainant lacked management skills and that he also lacked public sector experience at the required levels (T. 147, 148).

Norman also testified that MESC's decision not to offer the temporary treasurer's position to complainant had been based solely upon his lack of qualifications and that complainant's citizenship status and/or his national origin had not been considered in reaching that determination. He stated that neither of those factors had been considered in 1976 when complainant was initially hired to work for the State of Michigan, nor were they given any consideration by Norman in 1979 when he hired complainant for a position in respondent agency, nor have they been factors at any other time (T. 153).

Norman further stated that after having hired complainant in 1979 for a management position which involved
seven persons or so (T. 172) at respondent
Community Services, Norman moved to disch
thereafter because complainant had not p
Complainant filed a grievance, in whic
to terminate his State employment.
settlement under which complainant w
given a position within respondent a
to his former management positic

I

The primary issue is that of
violated the unfair immigration-
provisions of IRCA, as complaina
having selected complainant for
because of complainant's Hispani
citizenship status.

Another issue, among others, involves a determination of whether complainant timely filed his charge with OSC.

Discussion, Findings, and Conclusions

The pertinent provisions of IRCA, at 8 U.S.C. §1324b(d)(3), mandate that complaints based upon unfair immigration-related employment practices, as here, must be filed within 180 days of the date upon which the alleged discriminatory act occurred.

In filing his charge with OSC initially on May 10, 1990, and again when filing the Complaint at issue with OCAHO on November 23, 1990, complainant alleged that respondent had knowingly and intentionally refused to hire him for the MESC treasurer position on October 1, 1989.

Accordingly, to have been timely filed, complainant's initiating charge must have been filed 180 days from October 1, 1989, or by March 30, 1990. Since complainant did not file his charge with OSC until May 10, 1990, or some 221 days later, or some 41 days beyond the filing deadline, he cannot maintain this action.

Had complainant timely filed the charge at issue with OSC and OCAHO, he could not have prevailed in this proceeding because a review of the evidence discloses that complainant has failed to satisfactorily demonstrate that respondent has committed the discriminatory acts alleged.

The action which complainant pursues in this proceeding, that of asserting that respondent, his employer, knowingly and intentionally refused to hire him for the MESC treasurer position because of his Hispanic national origin and/or his citizenship status, is that set forth in Section 102 of IRCA, (Pub. L. 99-603, 100 Stat. 3374 (Nov. 6, 1986), 8 U.S.C §1324b, which amended Chapter 8 of Title II of the Immigration and Nationality Act of 1952 (INA), 66 Stat. 163; 8 U.S.C. §1101, et seq., by adding after section 274A of INA the following new section, in pertinent part:

> "Unfair Immigration-Related Employment Practices"
>
> Sec. 274B. (8 U.S.C. 1324b) (a) Prohibition of Discrimination Based on National Origin or Citizenship Status.-
> (1) General Rule.-It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined

> in section 274A(h)(3) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment-
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a citizen or intending citizen (as defined in paragraph (3)), because of such individual's citizenship status.
>
> (Emphasis Added) * * * * *

It can readily be seen that the scope of the statutory remedies provided for under the section of IRCA at issue, 8 U.S.C. §1324b, are narrow inasmuch as actions of this type are permitted in only three workplace settings: (1) in the hiring of an individual: (2) in the recruitment or referral for a fee of an individual; or (3) in discharging or firing of an employee.

Meanwhile, the discrimination remedies which the provisions of Title VII extend to persons occupying complainant's status are considerably broader. In addition to those three areas, Title VII covers a much wider range of claims of national origin discrimination, including promotions, benefits, salaries, raises, and conditions of employment, among others. It is to be noted that Title VII provides only for claims based upon national origin discrimination and, unlike IRCA, does not cover claims of discrimination which are based upon citizenship status, or alienage. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973). Accordingly, complainant's claim of citizenship discrimination is actionable only under IRCA.

While claimant's charge of employment related national origin discrimination is actionable under Title VII or IRCA, a claim of that nature may only be pursued under IRCA in those cases involving employers whose workforce numbers between 4 and 14 employees. That because the provisions of IRCA, as well as the pertinent implementing regulations, provide that persons or other entities employing three or fewer persons are exempt. 8 U.S.C. §1324b(a)(2)(A); 28 C.F.R. 44.200(b)(1)(i). And also because other provisions of IRCA provide that protection against immigration-related national origin discrimination shall be covered unless the proscribed employment practice, as here, is also covered under the provisions of Title VII, which confers exclusive jurisdiction concerning such claims on the Equal Employment Opportunity Commission (EEOC), as opposed to OSC within the Department of Justice. And complainant's charge is covered under Title VII, rather than IRCA, because all employment related claims of national origin discrimination involving employers having 15 or more employees, as here, must be adjudicated under Title VII. 42 U.S.C. §2000e(b).

In view of the foregoing, complainant's charge of immigration-related employment discrimination based upon citizenship status is properly before OCAHO, because a claim of that type may only be asserted under IRCA, owing to the fact, as noted earlier, that such a claim is covered under the provisions of IRCA, but not under those of Title VII.

And complainant's alternate claim of immigration-related employmnent discrimination based upon national origin cannot be entertained by OCAHO under IRCA since, as previously noted, complainant's employer, the State of Michigan, has a workforce well in excess of the threshold jurisdictional level of 15 employees, thus conferring exclusive adjudicatory jurisdiction upon EEOC, under the provisions of Title VII.

Given that fact, an examination of complainant's claim of citizenship status discrimination is in order. In pursuing this charge, complainant has alleged that respondent failed to hire him for the MESC treasurer position, in violation of the pertinent provisions of IRCA.

It could be argued that, as an employee of the State of Michigan since 1976, complainant should more properly have charged respondent with having failed to promote him to the position of MESC treasurer, rather than having alleged that respondent failed to hire him for that position, per se. In that event, complainant's charge of failure to promote, rather than one involving a failure to hire, would not be covered under IRCA and would be actionable under the provisions of Title VII. In addition, that alleged failure to promote would also be actionable under the Civil Rights Act of 1866, 42 U.S.C. §1981 (Section 1981), upon a showing that the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer. Patterson v. McClean Credit Union, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989).

In order to allow complainant the widest measure of administrative review, the charge will be viewed as one in which respondent has been charged with having improperly refused to hire complainant for that position because of his citizenship status, as a result of disparate treatment in the selection process.

view of this evidentiary record
meet the required evidentiary

by a review of the pertinent
rative law judges in analagous
proof imposed upon persons

ing charges of this type under IRCA parallels that which is red of litigants seeking redress under Title VII. Huang v. s Hotel, OCAHO Case No. 91200021 (August 9, 1991); Williams cas & Associates, OCAHO Case No. 89200552 (July 24, 1991); v. Tempel Steel Company, supra; U.S. v. LASA Marketing Firms, HO 141 (March 14, 1990).

s noted previously, complainant's assertions in the instant r are based upon disparate treatment in respondent's tional selection process namely, that he was equally or more fied for the MESC treasurer position than Dore but was not ted because respondent treated him differently on the basis s citizenship status. Specifically, complainant alleges that ndent discriminated against him because he is a naturalized d States citizen, as opposed to having been born in the d States.

n the area of disparate treatment, guidance is available in upreme Court ruling in McDonnell Douglas Corp. v. Green, 411 792, 802 (1973), the leading case concerning Title VII yment discrimination charges based upon disparate treatment e hiring process. In discussing the evidentiary burden of which a prevailing party must successfully bear in that type eding, the Court ruled that the plaintiff therein was red to establish a prima facie case of discrimination and was er required to prove by a preponderance of the evidence:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

he order and allocation of proof in Title VII cases involving rate treatment was further defined in a later Supreme Court g, Texas Department of Community Affairs v. Burdine, 450 U.S. 1981), where it was held that upon a showing of a prima facie of discrimination by a preponderance of the evidence, an ence of discrimination arises and imposes upon the defendant den of rebuttal which respondent successfully assumes by ulating with specificity a legitimate, non-discriminatory n for not having hired plaintiff. Given that showing, the tiff then has the opportunity to prove, once more by a

preponderance of the evidence, that the legitimate reasons offered by the defendant were not its true reasons for not having hired plaintiff, but instead were a pretext for intentionally discriminating against plaintiff. 450 U.S. at 249.

Accordingly, in order to present a prima facie case of discriminatory failure to hire under IRCA, complainant must show: (1) that he belongs to a class of persons protected by IRCA; (2) that he applied and was qualified for a job for which respondent was seeking applicants; (3) that despite being qualified, he was rejected; and (4) that, following his rejection, the position remained open and respondent continued to seek applicants from individuals having complainant's qualifications. U.S. v. Marcel Watch Corp., 1 OCAHO 143 (March 22, 1990); U.S. v. Mesa Airlines, 1 OCAHO 74 (July 24, 1989).

Should complainant fail to successfully meet that evidentiary burden, an appropriate order dismissing his complaint must be entered, 8 U.S.C. §1324b(g)(3); 28 C.F.R. §68.52; Williams v. Lucas & Associates, supra; Ryba v. Tempel Steel Co., supra; Adasti v. Citizens, Etc., 1 OCAHO 203 (July 23, 1990); Akinwande v. Erol's, 1 OCAHO 144 (March 23, 1990).

Mindful of the evidentiary requirements expressed in the McDonnell and Burdine rulings, the disputed facts will be reviewed and analyzed in order to arrive at a determination concerning complainant's charge that but for the fact that he is a naturalized United States citizen rather than one who acquired such status by birth, he would have been named to the MESC treasurer position instead of Dore.

In support of that assertion, complainant's argumentation is largely, if not entirely, based upon statistical and perceived policy bases. Stated simply, complainant believes that Hispanics are underrepresented in MESC's 2,210-person workforce, especially at the upper grade and salary levels, and also that Afro-Americans receive favorable treatment at MESC in comparison to that which is accorded Hispanics or naturalized United States citizens, as opposed to United States nationals.

Meanwhile, respondent relies upon a rather simple and straightforward reason namely, it selected Dore rather than complainant because it was determined that he possessed the qualifications and work experience for the MESC treasurer position and that complainant did not.

For the following reasons, only respondent's position is supported by the evidence. Complainant testified that Hispanics comprise 1.8 to 2 percent of the population of Michigan and that they comprise about 3 percent of the State of Michigan workforce, but that no Hispanics have been named or promoted beyond the 15 level. He also testified that such percentages constitute prima facie evidence of discriminatory employment practices concerning Hispanics (T. 123-128). But, as noted earlier, this proceeding involves a claim being pursued on the basis of citizenship discrimination solely, and not upon national origin discrimination. For that reason, evidence of national origin is not relevant in this proceeding and should be asserted, instead, in the pending Title VII action.

Complainant presented no evidence that respondent intentionally treats naturalized citizens less favorably than native born United States citizens.

Respondent's evidence, meanwhile, discloses that in filling the MESC treasurer position the interested applicants had to present specific work related experience qualifications in order to be considered for that position, without regard to their citizenship status. In reviewing the applications of complainant and Dore, it was respondent's opinion that complainant's qualifications did not equal those of Dore.

A comparison of the candidates' resumes confirms respondent's judgment in the matter. Dore clearly presented educational and job-related experience (Respondent's Exh. B) which justifies his having been selected rather than complainant, whose resume was found to be lacking (Complainant's Exh. 4).

In assessing respondent's selection of Dore rather than complainant for the position in question, respondent's decision in that regard was based upon respondent's belief that complainant is more qualified from an academic standpoint than from one based upon those jobs which complainant has undertaken and performed satisfactorily in the workplace since concluding his formal education in 1978.

In that connection, one can reasonably conclude that respondent's assessment of complainant's job skills coincides with that of the officials of Wolverine World Wide, as expressed in May 1976 according to complainant's testimony, to the effect that complainant's academic qualifications clearly outweigh his job-related qualifications earned by performance in the work place.

I find that complainant's evidence has failed to establish a prima facie case of citizenship status discrimination, as alleged, and even in the event that said evidence could be viewed as having been sufficiently probative to have served that purpose, I further find that respondent has presented legitimate nondiscriminatory reasons why complainant was not selected for the MESC treasurer position. Given that fact, complainant has failed to show that those legitimate reasons advanced by respondent were a pretext for discrimination.

For these reasons, complainant's request for administrative relief must be denied.

Order

Complainant's November 23, 1990, Complaint which alleged immigration-related employment practices based upon national origin and/or citizenship status discrimination, allegedly in violations of the provisions of 8 U.S.C. §1324b, is hereby ordered to be dismissed.

Joseph E. McGuire
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. §1324b(g)(1), this Decision and Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. §1324b(i), any person aggrieved by such Order seeks a timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.

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